UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION TWENTY-FIVE
SUBREGION THIRTY-THREE

UNIQUE PERSONNEL CONSULTANTS, INC.,	)	
	)	
Respondent,	)	
	)	
And	)	Case 25-CA-132398
	)	
ANA OROZCO, an Individual,	)	
	)	
Charging Party.	)	

UNIQUE PERSONNEL CONSULTANTS, INC.'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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Respondent UniQue Personnel Consultants, Inc. ("UniQue"), files this brief in support of its Exceptions to the Decision of the Administrative Law Judge ("ALJ") entered in this matter on May 28, 2015.

I. STATEMENT OF THE CASE

The individuals testifying at the November 20, 2014 hearing were Ana Orozco, the charging party; Melinda McFadden; Elyce Rehmke; Anna Castro; Jasper Smith; and Stacey Wiltermood. At the time of the hearing, all of these witnesses, with the exception of the charging party, were employed by UniQue in various positions. UniQue is a full-service staffing agency. (Tr. at 16:9-11). Ana Orozco ("Orozco") was hired by UniQue on a temporary basis in August of 2012. (Tr. at 35:22-36:3). Orozco became a full time employee starting on December 3, 2012. (Tr. at 27:16-20; 35:22-36:8). Orozco, who worked out of the Galesburg, Illinois office, was an administrative assistant with UniQue. (Tr. at 35:22-24; 36:9-10). Orozco testified that as an administrative assistant she would answer phone calls, update associate files and file and help associates with their applications if they had any questions. (Tr. at 36:11-15).

Melinda McFadden is an Area Manager for UniQue. (Tr. at 15:11-12). As Area Manager, Ms. McFadden manages the Branch Managers of each location within her region, which included the Galesburg office where Orozco worked. (Tr. at 15:15-17). Elyce Rehmke is UniQue's Managing Consultant at the Galesburg and Macomb, Illinois branches. (Tr. at 17:14-16; 183:24-25; 184:4-9). Anna Castro is employed by UniQue as an on-site supervisor for one of UniQue's clients. (Tr. at 154:25-155:9). From the time Ms. Castro started working at UniQue until June of 2014, she went to the Galesburg office every Thursday. (Tr. at 155:16-25). Ms. Castro and Orozco (the charging party) reported directly to Ms. Rehmke. (Tr. at 17:17-25; 37:2-4). Ms. Rehmke reported to Ms. McFadden. (Tr. at 16:12-19).

Jasper Smith is a mobile IT Technician for UniQue. (Tr. at 128:4-9). He travels from branch office to branch office, including the Galesburg office, and works on IT issues for UniQue. (Tr. at 129:3-25). He testified that he was at the Galesburg office "at least 10 to 15 times" while Orozco (the charging party) was working there. (Tr. at 130:1-3). Stacey Wiltermood was subpoenaed by the charging party to testify at the hearing. At the time of the hearing, she had been employed by UniQue as an Administrative Assistant for about 2 ½ years. (Tr. at 122:7-21). At the time of the hearing, Ms. Wiltermood worked at the Quincy, Illinois office but previously worked at the Macomb branch. (Tr. at 123:1-6). Her immediate supervisor when she worked at the Macomb office was Melinda McFadden. (Tr. at 123:7-9). No evidence was presented that Ms. Wiltermood ever had any conversations with Orozco.

Orozco was discharged on June 27, 2014. (Tr. at 29:18-20; 35:22-36:3). She was terminated for unprofessionalism in the workplace consisting of attitude, dress code and negativity to other staff and corporate representatives. (Tr. at 30:3-7)(G.C. Ex. 6). Orozco's unprofessional conduct included spending work hours discussing personal matters (such as being hung over and conduct that occurred at bars or other locations after working hours) and interfering with other employee's ability to perform their work. (Tr. at 31:12-32:2; 91:23-25; 92:20-22; 159:1-25; 188:18-19; 218:21-219:19; 242:25-243:9). In addition, as set out below, the evidence showed that on numerous occasions Orozco presented an unprofessional appearance.

Orozco Violated UniQue's Dress Code Policy.

UniQue had a dress code policy. (Tr. at 38:24-25)(G.C. Ex. 9). Orozco testified that she was told about the dress code when she was hired as a temp in July of 2012 (Tr. at 91:12-15) and that she read the policy in December of 2012, when she was hired as a permanent employee. (Tr. at 91:20-22). Ms. Castro, who became Orozco's friend, testified that Orozco's appearance

was "sometimes inappropriate due to low necklines" and that she "just didn't have a professional appearance." (Tr. at 56:7-8; 156:16-19; 162:15-163:1). Orozco was orally counseled on numerous occasions regarding her unprofessional appearance. For instance, Ms. McFadden testified that she tried to coach Orozco regarding her appearance. (Tr. at 228:23-229:11). Ms. McFadden would talk to Orozco about what she had worn to work and reminded her to dress appropriately for a professional work environment. (Tr. at 218:3-8). Ms. McFadden even provided Orozco with some of her own clothes so that she would have professional dress options. (Tr. at 228:23-229:11). Ms. Rehmke (Orozco's immediate supervisor) explained that she wanted Orozco to know that people were making comments about her looks and that she should not be dressing like she was going out for the night or trying to get compliments at the workplace. (Tr. at 189:24-190:5).

On several occasions, Ms. McFadden talked to Orozco about the piercings on her face. (Tr. at 218:2-3). Orozco had facial piercings in her eyebrow, nose and the area between her nose and lip. (Tr. at 48:16-19). The dress code policy provides that "[g]enerally, the wearing or display of body piercing jewelry is prohibited except for conservative earrings by female employees." (G.C. Ex. 9). At least by the time she became a full time employee, Orozco knew that wearing piercings to work violated the dress code. (Tr. at 92:23-93:2; 169:14-16). Despite this knowledge, Ms. McFadden would have to tell Orozco to take her facial piercings out while at work. (Tr. at 49:14-19; 93:21-94:5). At the hearing, Orozco testified that "when Melinda came to the office she would point at the piercings" and that Orozco understood that gesture to mean she "should take them out." (Tr. at 93:21-24). Ms. Castro testified that Orozco wore her facial piercings in the office pretty much **every time** Ms. Castro was in the office, but that she

would take them out if she knew that either of her two bosses, Ms. McFadden or Ms. Rehmke, was coming to the office. (Tr. at 169:1-13).

Notwithstanding such counseling and warnings, Orozco continued to violate the dress code policy and was ultimately given two write-ups for dress code violations. The first dress code write-up was dated March 18, 2013. (G.C. Ex. 10). At that time, Orozco was written up for wearing a sweat suit to work. (Tr. at 45:16-46:1)(G.C. Ex. 10). It was noted in the write-up that Orozco had been "verbally warned on a couple of occasions to make sure she is dressed professionally at work." (G.C. Ex. 10). The write-up also provided that the piercings in her face "are to be taken out while at work" and that she "needs to make sure she is wearing professional attire while at work." (G.C. Ex. 10).

Orozco was given additional oral warnings for dress code violations **after** the March 2013 write-up. (Tr. at 70:2-71:7; 105:5-9). Orozco admitted that she was warned about shoes she wore and that she received a couple of warnings for her piercings. Id.

> Q. Were there more oral warnings after the March 2013 write-up?
>
> A. Like I said there was only like a couple of – well, there was the one time Elyce was talking about my shoes and a couple times for my piercings.

(Tr. at 105:5-9).

The last dress code write-up Orozco received was dated June 3, 2014, and constituted a final written warning. (G.C. Ex. 11). At that time, Orozco was cited for wearing inappropriate attire to a golf outing that UniQue helped sponsor. (G.C. Ex. 11). She was disciplined for not wearing business professional attire. Id. It was noted that 'professional dress is required both in the office and in public when representing UniQue. (G.C. Ex. 11). Ms. Castro, who became a friend of Orozco, agreed that Orozco deserved the dress code write-ups and that the outfit Orozco wore to the golf outing was inappropriate for this occasion. (Tr. at 167:21-168:15).

There was testimony that a couple of people associated with the Chamber of Commerce who had attended the outing had commented on the pants Orozco wore to the event. (Tr. at 68:18-69:2).

The e-mail to the employees regarding the golf outing included the following language:

> Per the flyer: DRESS REQUIREMENTS: collared shirts, no denim, no halter or sting strapped tops, Please wear your UniQue polo and pants or shorts (nothing too short and NO jean shorts). Remember we are walking advertising for UniQue and at a chamber event so we want to dress to impress!

(G.C. Ex. 12). G.C. Exhibit 18 is a picture of the pants worn by Orozco to the golf outing. Following her termination, Orozco reported to one of her relatives that she was fired for a dress code violation for wearing camouflage pants at the company golf outing. (Tr. at 97:23-98:13).

Ms. Castro testified that Orozco complained to her about the dress code write-up. (Tr. at 163:6-8). Ms. Castro further testified that when Orozco complained about work issues, like the dress code and the write-ups, Ms. Castro **never** agreed with Orozco's complaints. (Tr. at 163:9-12). Ms. Castro testified that Orozco's complaints were her own **personal gripes** and were **not the views of anyone else**. (Tr. at 163:22-164:2). Specifically, Ms. Castro testified as follows at the hearing:

> Q. Did you ever have the same concerns Ms. Orozco had about the work issues she complained about?
> A. For myself, no.
> Q. Did anyone that you're aware of have those same concerns Ms. Orozco had?
> A. Not at all.
> …
> Q. Did you consider the statements Ms. Orozco made to you her own personal gripes or personal complaints?
> A. Yes.
> Q. Were those personal gripes and personal complaints to your knowledge the view of anyone else at the company?
> A. It's no one else's.

(Tr. at 163:13-164:2). Ms. Castro further stated that Orozco's complaints did not represent her views regarding the company and that she was happy there. (Tr. at 172:5-7). Ms. Castro was not

in management with Unique. She was in a similar position in the chain of command to Ms. Orozco. (Tr. at 17:17-25)

Discussing Personal Matters During Work Hours.

Orozco would talk excessively about her personal life at work. (Tr. at 218:21-219:19; 242:25-243:9). Orozco admitted having personal conversations at work with employees of UniQue, including talking to people at the office about the bar her family owns. (Tr. at 91:23-25; 92:20-22). Admittedly, other people would on occasion talk about non-work related topics in the workplace, but not excessively like Orozco did. (Tr. at 242:25-243:9). Ms. Castro testified that Orozco would talk about her family bar "**all the time**." (Tr. at 159:1-25). Ms. Rehmke testified that Orozco would talk about her nightlife. (Tr. at 188:18-19). Some of the personal comments and personal life anecdotes from Orozco were, in Ms. Rehmke's opinion, absolutely inappropriate. (Tr. at 187:21-188:19). Ms. McFadden talked to Orozco about her inappropriate workplace conversations. (Tr. at 237:3-9). Orozco's review dated July 12, 2013 contains the following criticism: "Socializing for long periods of time can delay work projects to get completed. (G.C. Ex. 4). Ana has also had some outside issues that she has brought to work with her and those issues also need to be left at home." (Tr. at 220:2-18) (G.C. Ex. 4).

Orozco Distracted Others from Doing Their Jobs.

Orozco's constant chattering about her personal life and/or complaints about her individual employment issues became a distraction at work and were adversely affecting UniQue's business operations. (Tr. at 51:14-16; 166:24-167:7; 180:11-14; 228:19-22). Orozco's excessive talking was disruptive to other employees. (Tr. at 228:19-22). Ms. Castro told Ms. McFadden that Orozco talked too much to her. (Tr. 51:14-16). There was a meeting in 2013 between Ms. Castro, Orozco and Ms. McFadden at which Ms. Castro complained that Orozco

was always talking to her while at work. (Tr. at 171:15-21). Ms. Castro stated that it was difficult for her to get her job completed because of Orozco talking to her all the time. (Tr. at 166:24-167:7). Ms. Castro testified that following the meeting, Orozco's behavior changed for a period of time, but that it then **went back to the way it was**. (Tr. at 172:1-4). Ms. Castro testified that she found Orozco's conversations and the talking to "absolutely" be disruptive. (Tr. at 166:24-167:1). She further testified that she found the talking to be harassing to her work and her ability to do her job. (Tr. at 167:2-4; 180:11-14). Ms. Castro testified that she felt that her friend, Orozco, was performing her job until the last **several months**. (Tr. at 160:7-9). When asked what Orozco did the last few months, Ms. Castro answered that Orozco was talking to Ms. Castro, talking to associates, using her personal cell phone, texting, making bill payments and selling some kind of body wrap and vitamins. (Tr. at 160:10-24).

Ms. Rehmke testified that because of Orozco's incessant talking, she rearranged her schedule to try to get most of her work done in the Macomb office, because it was really hard for her to get her work done in the Galesburg office. (Tr. at 192:9-193:13). Ms. Rehmke further testified that because of Orozco's talking they even changed the layout of the office so that contact with Orozco would be avoided. (Tr. at 196:20-23; 198:14-199:4). Both Ms. Rehmke and Ms. McFadden testified that the decision to change the office layout was made because of Orozco's talking and before Orozco's termination even though the actual change in the layout occurred after Orozco's termination, when the new furniture arrived. (Tr. at 202:14-25; 240:22-242:7). Certain chairs in the administrative area were moved immediately because of the distraction caused by Orozco. (Tr. at 221:22-222:14).

Mr. Smith was at the Galesburg office for IT issues at least 10 to 15 times while Orozco was working there. (Tr. at 130:1-3). When he was there, Orozco would bombard him with

"nonstop chatter of things that necessarily did not pertain to the work at all." (Tr. at 130:4-7). Mr. Smith confirmed that Orozco would talk to him about all sorts of things, including, "the bar in town and different items of clothes she's bought … and complaints … regarding her issues with her managers and things of that nature." (Tr. at 130:4-12). She would also try to sell him body wraps. (Tr. at 130:13-18). Orozco would follow him to the areas where he was working. (Tr. at 131:12-14). On several occasions, Mr. Smith told her that he needed to work and that he needed to be left alone. (Tr. at 131:15-17). Mr. Smith testified that these conversations were disruptive of his work and he found them harassing. (Tr. at 131:21-132:9; 146:15-147:4).

Mr. Smith was at the Galesburg office in mid June 2014 to install a new phone system. (Tr. at 132:15-24). This was after Orozco had received her second write-up for violating the dress code policy. Mr. Smith arrived around 2:00 p.m. (Tr. at 132:15-24; 145:4-12).[1] Ms. Castro testified that he arrived "about maybe 2:30 or 3:00" that afternoon and she left at 4:45. (Tr. at 170:7-14; 295:15-296:9). Ms. Castro testified that on that day, Orozco was following Mr. Smith around and/or talking to him for a prolonged period of time. (Tr. at 170:19-171:5; 296:2-9).[2] Mr. Smith testified that it should have taken 30 to 45 minutes to do the job, but that it turned

[1] During his testimony he admitted that he was driving a rented white SUV that day;

> Q. Do you have a white SUV?
> A. No.
> Q. Have you ever –
> A. The day that I went was a rental.
> Q. Okay. So you were driving a white SUV on that day.
> A. … Yes.

(Tr. at 144:8-15).

[2] There was some confusion as to whether Ms. Castro observed the conversation with Mr. Smith and Orozco on June 5, 2014 (which was a Thursday) or June 11, 2014, which was a Wednesday. (Tr. at 298:3-20). Ms. Castro thought it was on the 5th because that was a Thursday, and she normally works on Thursdays. (Tr. at 298:11-20). She testified that she would normally not be

into at least a three hour project that day, because of Orozco's immediate and constant talking. (Tr. at 132:25-134:2). During that trip, Orozco complained to Mr. Smith about management and the dress code write-up. (Tr. at 134:21-135:1). Ms. Castro testified that she overheard part of this conversation. (Tr. at 169:17-170:5). Ms. Castro testified that Orozco followed Mr. Smith around the office and that she heard Mr. Smith tell Orozco that he had to get his work done. (Tr. at 170:15-171:5). At one point that day, Mr. Smith was in an office doing some work on a phone when Orozco walked in, closed the door behind her and complained to him for approximately 30 minutes. (Tr. at 136:10-24; 137:22-138:5). Another conversation that day occurred at around 5:15 after he had locked up the building and Orozco approached him. (Tr. at 136:16-24; 137:22-138:8). Mr. Smith testified that Orozco "pretty much did all the talking." (Tr. at 153:20-23). Mr. Smith testified that he never encouraged Orozco to talk to him about her complaints about the job. (Tr. at 135:18-21). Mr. Smith recalled that Orozco referred to a dress Ms. Rehmke had worn and that she told him it was raunchy. (Tr. at 135:5-17). He never agreed with the comments that Orozco made regarding Ms. Rehmke's dress. (Tr. at 135:5-17). He responded that Ms. Rehmke always looked nice in everything he had seen her wear. (Tr. at 135:5-17). Mr. Smith testified that Orozco never told him that other people agreed with her regarding her work complaints. (Tr. at 140:6-11). Rather, he testified that it was primarily all about her. (Tr. at 140:6-11).

Orozco also told Mr. Smith that she was going to go to and make a scene at and disrupt the upcoming company picnic. (Tr. at 136:25-137:21). She made similar comments to Ms.

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there on Wednesday, but that "maybe [she] had to do interviews that day because Thursday someone else was interviewing there." Id. Either way, she clearly recollected the exchange between Mr. Smith and Orozco. (Tr. at 169:17-170:5; 170:19-171:5).

Castro, who did not share this information with management until after Orozco was fired. (Tr. at 174:2-12; 223:9-224:5).

When Mr. Smith returned to the corporate office following this trip, he spoke to Chantelle Gregg in the Human Resources Department about Orozco's comments; including the fact that she said she was going to disrupt the company picnic. (Tr. at 138:9-139:4). Mr. Smith told Ms. Gregg that he felt Orozco's behavior was disruptive and harassing to him. (Tr. at 139:5-7). Mr. Smith testified that he had previously advised Ms. Gregg of the problems he had on the job because of Orozco's constant talking, much of which involved her personal life. (Tr. at 139:12-24). This constant talking would distract him and would result in a 20-30 minute job taking 3 to 4 hours. (Tr. at 139:11-24). Orozco's personal conversations and her individual job complaints were interfering with his ability to perform his job. Id. Mr. Smith did not have this problem at any other office. (Tr. at 139:25-140:2). No one at UniQue ever told him that he could not talk to other employees about company issues. (Tr. at 140:3-5).

Ms. Gregg told Mr. Smith that she would send the information he had relayed to her over to Melinda McFadden, Orozco's manager. (Tr. at 148:9-22). On June 26, 2014, Ms. Gregg contacted Ms. McFadden and told her what Mr. Smith had reported and that he was not able to get his work done in the Galesburg office because of Orozco's behavior. (Tr. at 222:18-223:4).

On June 27, 2014, Orozco was terminated for unprofessionalism. (Tr. at 224:24-225:6). Ms. McFadden informed Orozco of her termination on June 27, 2014. During that conversation, Ms. McFadden did not tell her that she could not talk to other employees and the termination letter given to her at that time contained no such provision. (Tr. at 81:16-23; 224:6-10)(G.C. Ex. 6). After Orozco was discharged on June 27, 2014, UniQue did provide notice to her that she should not contact UniQue's employees or customers subsequent to her discharge, other than

contacting Employer's Human Resources Department regarding benefits and final pay information. (G.C. Ex. 7). Ms. McFadden testified that she was concerned about what Orozco would do once she was terminated. (Tr. at 224:11-13). Her concern was based on the fact that (1) Orozco would talk about people who had her back and were there to protect her, and (2) the fact that Orozco had told Mr. Smith that she was going to cause a big scene at and disrupt the company party. (Tr. at 224:11-23). Ms. McFadden was also concerned regarding what Orozco would do and say to clients. (Tr. at 225:1-13). Ms. Castro also testified that Orozco had told her about people that she knew that would have her back and take care of things she needed taken care of." (Tr. at 164:3-15). As a result, Ms. Castro, who was Orozco's friend, testified that she was "a little bit in fear of what [Orozco was] capable of doing." (Tr. at 165:11-12).

Because of Ms. McFadden's concern about what Orozco would do at the company picnic, which was scheduled for the day after her termination, and based upon Orozco's prior statements and fear of retribution, Ms. McFadden sent Orozco a letter not to contact any other UniQue employees, associates or customers by phone call, email, social media or in person at any public function, including the upcoming company party, other than to contact Human Resources regarding any benefits or final pay information. (G.C. Ex. 7) For the protection of its employees, the letter was copied to the Sheriff and State Attorney's office. (Tr. at 227:22-228:18).

II. QUESTIONS INVOLVED

1. Whether the ALJ erroneously and against the clear preponderance of all of the relevant evidence made key credibility and factual findings in favor of Orozco and against Respondent.

This question relates to the following exceptions:

- Respondent UniQue takes exception to the ALJ's credibility finding (at page 5, footnote 10 of the Decision) in favor of Orozco regarding the number of times Orozco was verbally warned about wearing body piercings as this finding is against the clear preponderance of all of the relevant evidence. (*See* Tr. at 93:21-24; 169:1-13).

- Respondent UniQue takes exception to the ALJ's factual finding (at page 5 of the Decision) that Orozco was not given any oral warnings about her body piercings after the March 2013 write-up as this finding is against the clear preponderance of all of the relevant evidence. (*See* Tr. at 105:5-9).

- Respondent UniQue takes exception to the ALJ's finding (at pages 9-10 of the Decision) that the testimony of Jasper Smith, a mobile IT Technician for UniQue, was not credible on the issue of when he arrived at the Galesburg office on June 11th and how long Orozco talked to him that day, as this finding is against the clear preponderance of all of the relevant evidence. (*See* Tr. at 130:1-132:24; 145:4-12; 169:17-170:5; 170:19-171:5; 295:15-296:9).

- Respondent UniQue takes exception to the ALJ's finding (at page 5, footnote 11 of the Decision) that Ms. McFadden's testimony that the office was reconfigured to restrict Orozco's socializing was not credible, as this finding is against the clear preponderance of all of the relevant evidence. (*See* Tr. at 196:20-23; 198:14-99:4).

- Respondent UniQue takes exception to the ALJ's finding (at page 6, footnote 12 of the Decision) that she did not credit Ms. McFadden's testimony that Ms. McFadden did not sell Scentsy products and Girl Scout cookies during work because Ms. McFadden never testified at all regarding Scentsy products or Girl Scout cookies. (*See* Tr. at 15-34, 213-257).

- Respondent UniQue takes exception to the ALJ's finding (at page 19 of the Decision) that she did not credit Ms. McFadden's testimony that she was only told of Mr. Smith's complaints to Human Resources regarding Orozco to the extent it involved him not being able to do his job and not Orozco's threat to disrupt the company picnic, because that was not Ms. McFadden's testimony. (*See* Tr. at 224:6-225:6).

2. Whether Orozco was Engaged in Concerted Activity.

This question relates to the following exceptions:

- Respondent UniQue takes exception to the ALJ's finding (at page 17 of the Decision) that Orozco was engaged in "concerted activity," as this finding is against the clear preponderance of all of the relevant evidence. Rather, the evidence shows that Orozco was distracting people from doing their job and making personal complaints, which were never intended to promote group action. (Tr. at 130:4-131:17; 131:21-132:9; 139:11-140:2; 146:15-147:4; 160:10-24; 166:24-167:1; 172:1-4; 192:9-193:13).

3. Whether the action taken by Ms. McFadden and/or Ms. Rehmke during the June 27, 2014 exchange in which Orozco was terminated violated Section 7 of the Act.

This question relates to the following exceptions:

- Respondent UniQue takes exception to the ALJ's conclusion (at page 13 of the Decision) that Ms. McFadden and Ms. Rehmke instructed Orozco on June 27th not to speak with fellow employees about terms and conditions of employment and her conclusion that this was a restraint on Orozco's and other employees' Section 7 rights to speak with fellow employees about terms and conditions of employment and interfered with their ability to engage in collective action with fellow workers, as this finding is against the clear preponderance of all of the relevant evidence. (Tr. at 81:16-23; 224:6-10)(G.C. Ex. 6).

- Respondent UniQue takes exception to the ALJ's finding (at page 14 of the Decision) that Ms. McFadden's conversation with Orozco on the morning of June 27th amounted to an unlawful interrogation as this assertion was not raised by the charging party in the Complaint and the finding is against the clear preponderance of all of the relevant evidence. (Tr. at 80:5-81:23; 224:6-10).

4. Whether the June 27th Letter sent to Orozco and others violated Section 8(a)(1) of the National Labor Relations Act.

This question relates to the following exception:

- Respondent UniQue takes exception to the ALJ's finding (at pages 15-16 of the Decision) that the June 27th letter sent to Orozco and others after she was terminated from UniQue violated Section 8(a)(1) of the Act, as this finding is against the clear preponderance of all of the relevant evidence. There existed a legitimate reason and substantial justification for the letter as UniQue was reasonably in fear of what Orozco might do. (*See* Tr. at 219:3-19; 224:6-20).

5. Whether, even if Orozco was engaged in concerted activity, which UniQue denies, UniQue violated Section 7 of the National Labor Relations Act.

This question relates to the following exceptions:

- Respondent UniQue takes exception to the ALJ's finding (at page 18 of the Decision) that Respondent had knowledge of any concerted activity prior to terminating Orozco, as that finding is against the clear preponderance of all of the relevant evidence and the law. (Tr. at 131:21-132:9; 140:6-11; 146:15-147:4; 153:20-23; 163:9-12; 163:22-164:2).

- Respondent UniQue takes exception to the ALJ's finding (at page 13 of the Decision) that UniQue violated Section 8(a)(1), because the evidence establishes that the discharge was not motivated by the alleged protected activity, that Orozco would have been discharged even in the absence of the alleged protected activity and that UniQue had legitimate non-discriminatory and non-retaliatory reasons for discharging Orozco. (*See* Tr. at 130:4-131:17; 131:21-132:9; 139:11-140:2; 146:15-147:4; 160:10-24; 166:24-167:1; 172:1-4; 192:9-193:13).

6. Whether the ALJ's finding that UniQue's stated reason for discharging Orozco was pretextual or false is erroneous.

This question relates to the following exceptions:

- Respondent UniQue takes exception to the ALJ's finding (at page 19 of the Decision) that UniQue's stated reason for discharging Orozco was pretextual or false and that it was the result of discriminatory animus towards Orozco, as that finding is against the clear preponderance of all of the relevant evidence.

- Respondent UniQue takes exception to the ALJ's finding (at pages 19-20 of the Decision) that the second dress code warning was unwarranted and the ALJ's finding (at page 8, footnote 16 of the Decision) that Orozco was wearing capris pants, as opposed to cargo pants, at the firm sponsored golf outing, as those findings are against the clear preponderance of all of the relevant evidence. (*See* G.C. Ex. 18).

III. ARGUMENT

1. The ALJ Made Key Fact and Credibility Findings Against Respondent and in Favor of Orozco That Were Against the Clear Preponderance of All of the Relevant Evidence.

Here, there were several key findings of fact that the ALJ made that were not supported by the evidence. Further in certain cases, the ALJ made findings in favor of Orozco or against Respondent on credibility issues that are not supported by the record and are against the clear preponderance of the evidence. An ALJ's credibility determinations may be disregarded where they are found to be unreasonable, self-contradictory or based on inadequate reasoning. Midwest Stock Exch., Inc. v. N.L.R.B., 635 F.2d 1255, 1265 (7th Cir. 1980). Each of these is discussed below.

a. The Evidence Does Not Support the ALJ's Finding that Orozco Was Only Warned Twice About Her Facial Piercings.

The ALJ noted that Orozco **admitted** that on **at least** 2 occasions McFadden saw her with piercings at work and pointed at her to remove them. (Decision at 5, n. 10). The ALJ indicated in her Decision that McFadden testified that this occurred on several occasions, "indicating more than two." (Decision at 5, n. 10). The ALJ then inexplicitly found that she credited "Orozco on this point." Id. The testimony on this topic supports the conclusion that this happened more than twice and that Ms. McFadden's testimony that it happened on several occasions was more credible. Even the ALJ found that Orozco **admitted** that it happened **at least** twice.

Orozco was asked whether "when Melinda [McFadden] came to the office she would point at the piercings." She said yes and that she understood that gesture to mean that she was to take the piercings out. (Tr. at 93:21-24). Further, there was testimony from Ms. Castro that Orozco wore here facial piercings, which she knew was against the dress policy, **every time** Ms. Castro was in the office. (Tr. at 169:1-13). Orozco would only take them out if she knew one of her bosses was scheduled to be at the office. (Tr. at 169:1-13). In light of this testimony, it is fairly extraordinary that the ALJ credited "Orozco on this point." The ALJ's credibility finding (at page 5, footnote 10 of the Decision) in favor of Orozco regarding the number of times Orozco was verbally warned about wearing body piercings is against the clear preponderance of the evidence.

b. The Evidence Does Not Support the ALJ's Finding that Orozco Was Never Warned About Her Facial Piercings After the March 2013 Write-Up.

The ALJ incorrectly found that all of the "verbal admonitions about her body piercings occurred prior to the March 18, write-up for the dress code violation." (Decision at 5). This finding is inaccurate. Orozco was specifically asked the following:

> Q. Were there more oral warnings **after** the March 2013 write-up?
>
> A. Like I said there was only like a couple of – well, there was the one time Elyce was talking about my shoes and a couple times for my piercings.

(Tr. at 105:5-9). In light of the fact that Orozco wore the piercings daily and only took them out when she knew that one of her supervisors would be in the office, it is logical that there would be additional warnings. This would include McFadden pointing to the piercings, which Orozco understood to be a directive to remove the piercings. (Tr. at 93:21-24). Orozco obviously knew of the rule prohibiting facial piercings, yet she purposefully and **routinely** violated it; for as Ms. Castro testified, Orozco wore here facial piercings **every time** Ms. Castro was in the office. (Tr. at 169:1-13). Ms. Castro did not qualify her testimony to only include the period before the March 2013 write-up. The ALJ's finding (at page 5 of the Decision) that Orozco was not given any oral warnings about her body piercings after the March 2013 write-up is against the clear preponderance of all the relevant evidence.

c. The Evidence Does Not Support the ALJ's Finding that Jasper Smith's Testimony on Certain Key Issues Was Not Credible.

The ALJ's finding (at pages 9-10 of the Decision) that the testimony of Jasper Smith, a mobile IT Technician for UniQue, was not credible on the issue of when he arrived at the Galesburg office on June 11th and how long Orozco talked to him that day is against the clear preponderance of the evidence.

Numerous witnesses testified that Orozco's incessant talking was distracting and made it very difficult for them to do their job. (Tr. at 51:14-16; 166:24-167:7; 180:11-14; 192:9-193:13;

228:19-22). Such testimony came not only from Mr. Smith but from Ms. Rehmke and Ms. Castro. (Tr. at 166:24-167:1; 172:1-4; 192:9-193:13). In light of this consistent testimony from various and numerous sources, it is quite perplexing that the ALJ found in favor of Orozco and against Mr. Smith regarding when Mr. Smith arrived at the Galesburg office, the amount of time that Orozco spent talking to him and the degree to which she distracted him from his work.

The ALJ did not believe Mr. Smith's testimony that he arrived at the Galesburg office on June 11 between 2:00 to 2:30, the amount of time Orozco spent talking to him or by necessary implication the fact that Orozco distracted him from doing his job by her incessant talking. On this very important issue, the ALJ in effect discounted not only the testimony of Mr. Smith, but that of Ms. Castro.

To support her conclusion that Mr. Smith was not credible, she cites to testimony which does not support her conclusion. For example, the ALJ found that Mr. Smith was reluctant to admit "something as innocuous as the type of vehicle he drove." (Decision at 10). As demonstrated below, his supposed reluctance to admit to the type of vehicle he was driving is not supported by his testimony.

Q. Do you have a white SUV?
A. No.
Q. Have you ever –
A. The day that I went was a rental.
Q. Okay. So you were driving a white SUV on that day.
A. Uh-huh. … Yes.

(Tr. at 144:8-15). Contrary to the ALJ's finding there was no reluctance expressed in answering these questions.

Further, according to MapQuest, it only takes 3 hours and 8 minutes to travel from Troy, Illinois to Galesburg, Illinois. If Mr. Smith left Troy at 9:30, as the record indicates (Tr. at

143:16-25), then he could have arrived at the office at about 12:45. Even with a reasonable lunch break it would not have taken him until 4:00 to arrive at the Galesburg office.

There was some confusion as to whether Ms. Castro observed the conversation with Mr. Smith and Orozco on June 5, 2014 (which was a Thursday) or June 11, 2014, which was a Wednesday. (Tr. at 298:3-20). Ms. Castro thought it was on the 5th because that was a Thursday, and she normally works on Thursdays. (Tr. at 298:11-20). She testified that she would normally not be there on Wednesday, but that "maybe [she] had to do interviews that day because Thursday someone else was interviewing there." Id. Either way, she clearly recollected the exchange between Mr. Smith and Orozco. (Tr. at 169:17-170:5; 170:19-171:5). She also clearly recollected that it was a prolonged exchange that took place during work hours. (Tr. at 169:17-170:5). She even testified that she heard Mr. Smith tell Orozco that he needed to get his work done. (Tr. at 170:15-171:5).

Incredibly, the ALJ found at page 10 of her Decision that the conversation between Orozco and Mr. Smith lasted only 10 minutes and that it occurred after hours on the parking lot. The ALJ then found that once Mr. Smith returned to the corporate office he spoke to human resources about Orozco disrupting his work with her complaints. The two findings are internally inconsistent. If in fact they only talked for 10 minutes in the parking lot as the ALJ found, then Mr. Smith would have had no reason to complain to human resources, which the ALJ found he did. That Mr. Smith's version is true is supported not only by Ms. Castro's testimony, but by the fact that Mr. Smith had previously reported the problem with Orozco's incessant talking to human resources. (Tr. at 139:11-140:2). Under these circumstances it was simply incredible for the ALJ to find in favor of Orozco on this point and against Mr. Smith and Ms. Castro. The finding is clearly against the preponderance of all the relevant evidence.

The evidence supports the conclusion that Mr. Smith arrived at 2:00 or 2:30 as he and Ms. Castro testified, rather than 4:00 as Orozco claims. The evidence further clearly supports the conclusion that Orozco's incessant talking was prolonged, occurred during work hours and was a distraction to Mr. Smith getting his work done.

d. Contrary to the ALJ's Finding, the Evidence Supports the Conclusion that the Office Was Reconfigured Because of Orozco's Talking.

The ALJ's finding (at page 5, footnote 11 of the Decision) that Ms. McFadden's testimony that the office was reconfigured to restrict Orozco's socializing was not credible is against the clear preponderance of the evidence. (*See* Tr. at 198:14-199:4). **Both** Ms. Rehmke and Ms. McFadden testified that they decided to change the office layout because of Orozco's talking. (Tr. at 195:18-196:23; 201:14-25; 221:22-14; 240:22-242:7). Ms. Rehmke testified that they changed the layout of the office so that contact with Orozco would be avoided. (Tr. at 198:14-199:4).

Both Ms. Rehmke and Ms. McFadden testified that even though the actual change in the layout occurred after Orozco's termination (when the new furniture arrived), the decision to change the office layout was made before Orozco's termination and because of Orozco's talking. (Tr. at 202:14-25; 240:22-242:7). In fact, certain chairs in the admin area, where Orozco was positioned, were moved immediately because of the distraction taking place in the admin area. (Tr. at 221:22-222:14). Ms. McFadden was asked about those distractions:

> Q. What were those distractions? Were they involving Ms. Orozco?
>
> A. Yes. The distractions were about her party life, her after-hour life, her being hung over, the darts that she was playing the night before, all the commotion that was happening both in her home life with her husband's DUI and the shooting that took place at the bar.

(Tr. at 222:8-14).

Ms. Rehmke's testimony was similar:

> Q. Tell the Court why you changed the layout.
>
> A. In the previous layout where the administrative desk was in the middle, that was right where the front door was … and that's where all of the applicants or client or anyone coming through our door would come right there.
>
> And then right behind that where the consultant desk was that was where my computer was set up. The sliding window that's in between the administrative desk and the consultant desk was broken so you couldn't slide that close….
>
> When I would be at my consultant desk, … you could hear almost all conversation whether it was work related or whether it wasn't. But it became an issue because individuals would come in and they would check in for work like they need to, and then they would sit there and … talk about, you know, what they were doing that night or going to the bar. I mean some things were work related as well…
>
> Q. So one of the reasons you moved the layout of the office around was because of Ana's talking … at the admin desk?
>
> A. Correct.

(Tr. at 195:18-196:23).

The ALJ's finding that Ms. McFadden's testimony as to why the office was reconfigured was not credible is against the clear preponderance of the evidence. The ALJ's finding in effect discredits not only Ms. McFadden's testimony but also the corroborating testimony offered by Ms. Rehmke. Further, it ignores all of the testimony as to how distracting Orozco's talking was in the office.

e. Contrary to the ALJ's Finding, Ms. McFadden Never Testified that She Only Sold Products during Non-work Hours.

The ALJ's finding (at page 6, footnote 12 of the Decision) that she did not credit Ms. McFadden's testimony that she did not sell Scentsy products and Girl Scout cookies during work

is erroneous because Ms. McFadden never testified at all regarding Scentsy products or Girl Scout cookies. (*See* Tr. at 15-34, 213-257). While the ALJ noted that her finding on this issue was immaterial to the merits of the case, because the Respondent was not contending that any of its actions were taken against Orozco because she sold nonwork-related products during business hours (Decision at 6, n. 12), this finding against Ms. McFadden on a topic that she never even addressed during the hearing nevertheless demonstrates an unreasonable prejudice and clear bias by the ALJ against Ms. McFadden.

f. Contrary to the ALJ's Finding, Ms. McFadden Never Testified that She Was Not Made Aware of Orozco's Threat to Disrupt the Company Picnic Prior to Her Termination.

Respondent UniQue takes exception to the ALJ's finding (at page 19 of the Decision) that she did not credit Ms. McFadden's testimony that she was only told of Mr. Smith's complaints to Human Resources regarding Orozco to the extent it involved her disrupting him from doing his job and not Orozco's threat to disrupt the company picnic, because that was not Ms. McFadden's testimony. (*See* Tr. at 224:6-225:6). Ms. McFadden testified that she was fearful of what Orozco might do following her termination and that this fear was based on 1) statements from Orozco that people had her back and were there to protect her; and 2) "that [Orozco] was going to blow up … at the summer party." (Tr. at 224:11-20). When asked if this was something that Mr. Smith had talked to Chantelle in HR about prior to Orozco's termination, she responded "yes." (Tr. at 224:21-23). Ms. McFadden testified that during her conversation with Chantelle they talked about Orozco planning to do something that was inappropriate." (Tr. at 223:5-15).

The ALJ's finding that Ms. McFadden "would have me believe that despite the disparity in importance, [Chantelle] Gregg conveyed the more minor infraction while neglecting to convey

an alleged credible threat" (Decision at 19), is completely contrary to the testimony elicited during the hearing and again exhibits a clear bias against Ms. McFadden and UniQue.

2. Orozco Was Not Engaged in Concerted Activity as Defined by Section 7 of the National Labor Relations Act.

Congress enacted the National Labor Relations Act ("NLRA") in 1935 to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices, which can harm the general welfare of workers, business and the U.S. economy[3]. In enacting section 7 of the Act, "Congress sought generally to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment." El Gran Combo de Puerto Rico v. N.L.R.B., 853 F.2d 996, 1002 (1st Cir. 1988) *citing* N.L.R.B. v. City Disposal Services, Inc., 465 U.S. 822, 835, 104 S.Ct. 1505, 1513, 79 L.Ed.2d 839 (1984).

Section 7 of the NLRA protects "the right … to form, join, or assist labor organizations … and **to engage in** other **concerted activities for** the purpose of collective bargaining or other **mutual aid or protection**." 29 U.S.C. § 157. Pursuant to Section 8(a)(1) of the Act, employers may not "interfere with, restrain, or coerce employees in the exercise" of their Section 7 rights. 29 U.S.C. § 158(a).

The term "concerted activity" is not defined in the Act. City Disposal Sys. Inc., 465 U.S. at 830, 104 S. Ct. at 1511. It, however, clearly embraces the activities of employees who have joined together in order to achieve common goals. Id. Generally, concerted activity is undertaken **jointly** by employees for, among other things, mutual aid or protection. Such activity includes employee efforts to improve working conditions and terms of employment.

[3] http://www.nlrb.gov/resources/national-labor-relations-act. Accessed 7/9/15.

Eastex, Inc. v. N.L.R.B., 437 U.S. 556, 566, 98 S. Ct. 2505, 2512, 57 L. Ed. 2d 428 (1978). "What is not self-evident from the language of the Act, ... is the precise manner in which particular actions of an individual employee must be linked to the actions of fellow employees in order to permit it to be said that the individual is engaged in concerted activity." City Disposal Sys. Inc., 465 U.S at 830–31, 104 S.Ct. 1505.

a. Orozco Was Not Engaged in Concerted Activity but Rather Was Asserting Personal Complaints, Which Were Never Intended to Promote Group Action.

In certain situations, courts have recognized the possibility that an individual employee may be engaged in concerted activity when he acts alone. City Disposal Sys. Inc., 465 U.S. at 831, 104 S. Ct. at 1511. Courts have generally limited their recognition of this type of concerted activity to two situations: (1) that in which the employee acts as a representative of at least one other employee, and (2) that in which the lone employee intends to induce group activity. Id. Neither of these situations applies here.

To find an employee's activity to be "concerted" the action must be "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." N.L.R.B. v. RELCO Locomotives, Inc., 734 F.3d 764, 785 (8th Cir. 2013) *citing* Meyers Industries, Inc., 268 N.L.R.B. 493, 497 (1984) (Meyers I). The definition of concerted activity encompasses those circumstances where individual employees seek to initiate, induce, or prepare for group action as well as actions by individual employees bringing truly group complaints to the attention of management. Meyers Indus., 281 N.L.R.B. 882, 887 (1986) (Meyers II).

A conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qualify as such, it must appear at the very least that it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees. El Gran Combo de Puerto Rico, 853 F.2d at 1004.

See also Mushroom Transp. Co. v. N. L. R. B., 330 F.2d 683, 685 (3d Cir. 1964)(same). Activity which consists of mere talk must, in order to be protected, be talk looking toward group action. El Gran Combo de Puerto Rico, 853 F.2d at 1004. *See also* Mobil Exploration & Producing U.S., Inc. v. N.L.R.B., 200 F.3d 230, 239 (5th Cir. 1999) (A conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qualify as such, it must appear at the very least that it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees).

While trying to enlist other employees to support one's grievance is protected, mere griping to other employees is not protected. Trochuck v. Patterson Companies, Inc., 851 F. Supp. 2d 1147, 1152 (S.D. Ill. 2012). In other words, "talk looking toward group action" is protected; mere griping is not. Mushroom Transp. Co., 330 F.2d at 685 (3d Cir.1964); JCR Hotel, Inc. v. N.L.R.B., 342 F.3d 837, 840 (8th Cir. 2003); RELCO Locomotives, Inc., 734 F.3d at 790. *See also* Indiana Gear Works v. N.L.R.B., 371 F.2d 273 (7th Cir. 1967)(A complaint or gripe by an employee is not a concerted activity protected by NLRA); Pelton Casteel, Inc. v. N.L.R.B., 627 F.2d 23, 28 (7th Cir. 1980) ("[T]he employee's actions themselves [must] at least contemplate some group activity. … [P]ublic venting of a personal grievance, even a grievance shared by others, is not a concerted activity."). If the only purpose of the talk is to advise an individual as to what the complaining party could or should do "without involving fellow workers or union representation to protect or improve his own status or working position, it is an individual, not a concerted, activity, and, if it looks forward to no action at all, it is more than likely to be mere 'griping.'" Mushroom Transp. Co., 330 F.2d at 685.

Whether an employee has engaged in concerted activity is a factual one based on the totality of the record evidence. Meyers Industries, 281 N.L.R.B. 882, 886 (1986)(Meyers II). Here the circumstances fail to establish that Orozco acted other than solely by and on behalf of herself. Orozco's comments were not concerted. They were based on her own personal feelings. There is no evidence that her statements were intended for the employees' mutual aid or protection. Specifically, none of her statements to her co-workers constituted activity by individuals who were united in pursuit of a common goal. Orozco's statements to Mr. Smith and Ms. Castro were not "with or on the authority of other employees," as required for violation of Sections 7 or 8 of the NLRA. *See* Meyers Industries, 281 N.L.R.B. 882 (1986)(Meyers II). Quite the contrary, neither Mr. Smith nor Ms. Castro wanted to be interrupted in their work with Orozco's constant talking about her personal matters and/or individual work complaints. (Tr. at 171:15-21; 139:11-24). Mr. Smith would tell her that he wanted to be left alone so he could do his job. (Tr. at 131:15-17; 139:11-24). He complained to HR that she was distracting him from doing his job. (Tr. at 139:11-24). There is no evidence that Orozco's statements to Mr. Smith or Ms. Castro were intended to initiate, induce or prepare for group action or individual action bringing truly group complaints to the attention of the Employer.

There is no evidence, whatsoever, that Orozco's behavior was intended to lead to any group action or that she was acting on behalf of anyone except herself. The statements made by Orozco to Mr. Smith and Ms. Castro were regarding her individual employment complaints regarding her individual personnel situation and were not a concerted activity by multiple employees to address a common goal related to terms and conditions of employment. Orozco's statements to Mr. Smith and Ms. Castro did not constitute protected concerted activity. Instead, the statements were individual gripes, which other people did not agree with and/or did not want

to hear. Ms. Castro testified that Orozco's complaints were her own personal gripes and were not the views of anyone else. (Tr. at 163:22-164:2). Ms. Castro further stated that Orozco's complaints did not represent her views regarding the company, and that she was happy there. (Tr. at 172:5-7). Mr. Smith testified that Orozco never told him that other people agreed with her regarding her work complaints. (Tr. at 140:6-11). Rather, he testified that it was primarily all about her. (Tr. at 140:6-11). The record is void of any facts reasonably leading to the conclusion that Orozco's statements were anything but personal in nature. Her statements and behavior were nothing more than personal gripes. They neither contemplated nor promoted group action.

Since Orozco's statements regarding her individual personnel issues to Mr. Smith, Ms. Castro or other co-workers did not constitute concerted activity; such statements are not protected by the National Labor Relations Act. The ALJ's finding at page 17 of its Decision that Orozco was engaged in "concerted activity" is erroneous and unsupported by the evidence.

3. The Action Taken by Ms. McFadden and Ms. Rehmke During the June 27, 2014 Exchange, in Which Orozco Was Terminated, Did Not Violate Section 7 of the Act.

a. The ALJ's Finding that During the June 27th Exchange Ms. McFadden and Ms. Rehmke Instructed Orozco Not To Speak With Fellow Employees About Terms and Conditions of Employment Is Against the Clear Preponderance of the Evidence. Consequently, that Conversation Did Not Amount to a Restraint on Orozco's and Other Employees' Section 7 Rights to Speak With Fellow Employees About Terms and Conditions of Employment and Did Not Interfere With Anyone's Ability To Engage In Collective Action With Fellow Workers.

There is no evidence whatsoever that during the June 27th exchange, during which Orozco was terminated, that either Ms. Rehmke or Ms. McFadden instructed Orozco not to speak with fellow employees about terms and conditions of employment.

On this topic Orozco testified that Ms. McFadden asked her during this conversation what she said to Mr. Smith and if she told Mr. Smith that she was going to go to Dixie and

Chantelle. (Tr. at 80:19-81:6). Orozco testified that Ms. McFadden told her that she had put Mr. Smith in a bad spot by talking to him. (Tr. at 81:1-8). Orozco then testified that both Ms. McFadden and Ms. Rehmke told her that if she had a problem to come and talk to them and that if she had a problem with one of them, to talk to the other. (Tr. at 81:13-23). Specifically, the testimony was as follows:

> Okay. Elyce first told me: I told you – and she said this in like a stern voice – that if you had a problem to come talk to me or Melinda. If you had a problem with Melinda you'd come talk to me. If you have a problem with Melinda, you know, or with her go talk to Melinda.
>
> And then Melinda said the same thing. She said if I had a problem with her, I was supposed to go to Elyce. If I had a problem with Elyce, I was supposed to go to Melinda.

(Tr. at 81:16-23). Orozco said that she was then told by Ms. McFadden that she needed to get her stuff and she was given the termination letter, which indicated that she was being discharged due to her unprofessional behavior. (Tr. at 82:6-83:22) (Ex. G.C. 6).

The discharge letter included the following:

> I would ask you to refrain from discussing UniQue's business or any member of our staff in a negative manner that could hinder our business in anyway, this includes discussing UniQue with any of our associates. If we are made aware of any negative comments to community members, customers or prospect customers we will take legal action.

(Ex. G.C. 6). There was no testimony from Ms. McFadden regarding what was said during the June 27th exchange. Ms. McFadden did, however, testify that the termination letter was written to explain to Orozco that the reason for her termination was due to her unprofessionalism and because they were "fearful of what she would do and say to [UniQue's] clients." (Tr. at 225:1-6). Ms. Rehmke offered no testimony on what was said during the June 27th exchange.

The only testimony offered as to what was said during the June 27th exchange was that offered by Orozco. As outlined above, she did not testify that either Ms. McFadden or Ms.

Rehmke instructed her not to speak with fellow employees about terms and conditions of employment. Orozco testified that McFadden told her that she had put Mr. Smith in a bad spot by talking to him. But this is not the same thing as instructing her (or certainly others) not to talk to co-workers about terms and conditions of employment. Even if Ms. McFadden told Orozco that she put Mr. Smith in a bad spot by talking to him, then that would be entirely consistent with him not being able to get his work done because of her incessant talking. Her constant talking in fact did put him in a bad position because it took him much longer to do his job than it should have. Further, even if Ms. McFadden and Ms. Rehmke told Orozco that if she had a problem to talk to them and that if she had a problem with one of them to talk to the other, that is nothing like telling her not to voice complaints to other employees.

What Orozco claims was said to her during the June 27th exchange was in no way an instruction that she could not talk to co-workers about terms and conditions of employment. As such, that conversation could not amount to a restraint on Orozco's and other employees' Section 7 rights to speak with fellow employees about terms and conditions of employment and could not interfere with anyone's ability to engage in collective action with fellow workers.

b. The ALJ's Finding that Ms. McFadden's Conversation With Orozco on the Morning of June 27 Amounted To An Unlawful Interrogation Is Against the Clear Preponderance of the Evidence. Further, that Allegation Was Never Raised by the Charging Party and the Finding Constitutes a Due Process Violation.

The ALJ found that what Ms. Rehmke said during the June 27th exchange did not amount to an unlawful interrogation. On the other hand, the ALJ found that what Ms. McFadden said during that encounter did amount to an unlawful interrogation. The charge brought in the Complaint, however, was that Ms. Rehmke, not Ms. McFadden, interrogated Orozco. The ALJ is not allowed to raise an entirely new charge not raised in the Complaint. *See* N.L.R.B. v. Tamper, Inc., 522 F.2d 781, 789-90 (4th Cir. 1975)(The Administrative Law Judge should not

undertake to decide an issue which he alone has injected into the hearing); N.L.R.B. v. H.E. Fletcher Co., 298 F.2d 594, 600 (1st Cir. 1962)(Due process prohibits the enforcement of a finding by the Board of a violation "neither charged in the complaint nor litigated at the hearing."); Standard-Coosa-Thatcher Carpet Yarn Div., Inc. v. N.L.R.B., 691 F.2d 1133, 1139 (4th Cir. 1982) (The General Counsel specifically disavowed an interrogation theory at the hearing, and the Board was not entitled to charge a violation that was not pressed upon it by the complaining party.); Montgomery Ward & Co. v. N.L.R.B., 385 F.2d 760, 763 (8th Cir.1967) ("Evidence without a supporting allegation cannot serve as the basis of a determination of an unfair labor practice.") (citation omitted); N. L. R. B. v. Blake Const. Co., Inc., 663 F.2d 272, 279 (D.C. Cir. 1981)(The applicable law is clearcut. Both the Administrative Procedure Act and the Board's own rules require that the complaint inform the Company of the violations asserted. The Board may not make findings or order remedies on violations not charged in the General Counsel's complaint or litigated in the subsequent hearing.). Since Ms. McFadden was not charged with unlawful interrogation, this finding by the ALJ should not be adopted.

Further, what Orozco testified Ms. McFadden said during the June 27th exchange was very brief (*see* Sec. 3a, above) and contrary to the ALJ's finding, did not amount to an unlawful interrogation. The ALJ found that the decision to terminate Orozco was made the day before the exchange, on June 26, 2014 when human resources "contacted McFadden to inform her that Smith had complained to human resources about Orozco talking to him excessively which precluded him from completing his work in a timely manner." (Decision at 11). This is consistent with the termination letter being drafted and signed before the June 27th exchange between the parties began.

Section 8(a)(1) of the Act provides: "It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title." 29 U.S.C. § 158(a)(1). It is well established that interrogation of employees is not illegal per se. *See* Rossmore House v. Hotel Employees and Restaurant Employees Union, 269 N.L.R.B. 1176, 1177 (1984). An employer unlawfully interrogates an employee if his questioning is coercive or tends to interfere with the employee's rights under the Act. Rossmore House, 269 N.L.R.B. at 1177. The Board considers the "totality of the circumstances" to determine whether the employer's questioning is unlawful. *See* Id.; Barker ex rel. Nat. Labor Relations Bd. v. Latino Exp., Inc., 11 C 2383, 2012 WL 1339624, at *8 (N.D. Ill. Apr. 18, 2012). To fall within the ambit of Section 8(a)(1), either the words themselves or the context in which they are used must suggest an element of coercion or interference. Midwest Stock Exch., Inc., 635 F.2d at 1267. Factors set forth in Bourne v. N.L.R.B., 332 F.2d 47 (2d Cir. 1964) are often considered in determining whether an unlawful interrogation has occurred. Rossmore House, 269 N.L.R.B. at 1178, n. 20; Perdue Farms, Inc., Cookin' Good Div. v. N.L.R.B., 144 F.3d 830, 835 (D.C. Cir. 1998). The Bourne factors are:

(1) The background, i.e. is there a history of employer hostility and discrimination?
(2) The nature of the information sought, e.g. did the interrogator appear to be seeking information on which to base taking action against individual employees?
(3) The identity of the questioner, i.e. how high was he in the company hierarchy?
(4) Place and method of interrogation, e.g. was employee called from work to the boss's office? Was there an atmosphere of "unnatural formality"?
(5) Truthfulness of the reply.

Bourne, 332 F.2d at 48. The Bourne factors provide a framework, albeit not a required checklist, to use when assessing a purportedly coercive interrogation. Rossmore House, 269 N.L.R.B. at 1178, n. 20. In Multi-Ad Services, Inc. v. N.L.R.B., 255 F.3d 363, 372 (7th Cir. 2001), the Court stated that factors that ought to be considered in deciding whether a particular inquiry is coercive

include the tone, duration, and purpose of the questioning, whether it is repeated, how many workers are involved, the setting, the authority of the person asking the question, and whether the company otherwise had shown hostility to the union.

In totality, even if a charge had been made against UniQue for Ms. McFadden's alleged unlawful interrogation, which was not the case, the totality of the circumstances do not support a finding that the exchange between Orozco and Ms. Fadden amounted to an unlawful interrogation.

First, the evidence does not show there was a history of hostility towards Orozco. Rather, the evidence shows that despite her unprofessional appearance and behavior UniQue tried to work with Orozco. In fact her behavior improved for a period of time and her second review, conducted on November 25, 2013, reflected that improvement. (G.C. Ex. 25). The items that the ALJ mentions in her Decision as evidence of hostility reflect no such thing. First the write-up that she received for the outfit she wore at the golf outing does not reflect hostility. Maybe it reflects a difference of opinion as to what is appropriate to wear to a client function, but it does not reflect hostility. The pants that Orozco wore to the firm sponsored golf outing could certainly be considered camouflage cargo capris pants and most certainly could be considered inappropriate for this event. (*See* G.C. Ex. 18). They were commented on by people associated with the Chamber of Commerce. (Tr. at 68:18-69:2). This dress code violation write-up does not reflect hostility.

The second factor cited by the ALJ to support some sort of hostility between the parties is Ms. McFadden allegedly noting in Orozco's first performance appraisal her "repeated displeasure that Orozco discussed their conversations about work issues with other coworkers." (Decision at 14). In response to this allegation, UniQue states 1) that no such comment was

made in the second November 25, 2013 evaluation, which was a good evaluation; and 2) McFadden never noted any "repeated displeasure" with Orozco on this issue. Rather, the review form included the following comment: "It has been brought to my attention as well that whenever I address an issue it is talked about with other co-workers when it should be between Ana and I." (G.C. Ex. 4). That single comment does not show hostility towards Orozco. This is particularly apparent in light of the good evaluation she subsequently received. The second evaluation conducted on November 25, 2013 clearly demonstrates that at that time there was absolutely no hostility between the parties. (G.C. Ex. 25).

The last factor relied on by the ALJ to show hostility toward Orozco is Ms. McFadden and Ms. Rehmke supposedly telling Orozco that she should not share her complaints about them with co-workers. If this is in the record, Respondent cannot find it. Perhaps this refers to the June 27, 2014 exchange wherein Orozco testified that each said that she should come to them if she had a problem. They, however, did not instruct her not to talk to others if she had problems. For the reasons set out in Section 3a above, the ALJ's finding that during the June 27th exchange Ms. McFadden and Ms. Rehmke instructed Orozco not to speak with fellow employees about the terms and conditions of employment is against the clear preponderance of the evidence. There was no history of hostility between the parties.

Other factors also demonstrate that the exchange was not an unlawful interrogation by Ms. McFadden. The nature of the information sought demonstrates that Ms. McFadden was not seeking information on which to base action. In fact, it had already been decided before the exchange took place that Orozco would be terminated. As the ALJ found, this determination was made on June 26th when human resources "contacted McFadden to inform her that Smith had complained to human resources about Orozco talking to him excessively which precluded

him from completing his work in a timely manner." (Decision at 11). Any exchange between an employer and an employee the purpose of which is to discharge the employee would not seem to be the type of exchange that could constitute an unlawful interrogation under Section 8(a)(1) of the Act. Certainly, none of the cases cited by the ALJ in her Decision are factually similar.

Further, the exchange was of minimal duration, occurred at a conference table in the Galesburg office, and only included Orozco, Ms. Rehmke and Ms. McFadden.

Even if Ms. McFadden had been charged with an unlawful interrogation, which was not the case, what occurred during the June 27th exchange cannot reasonably be considered an unlawful interrogation.

4. UniQue Had a Legitimate Reason and Substantial Justification for Sending the June 27, 2014 Letter.

The ALJ's finding (at pages 15-16 of the Decision) that there was no legitimate and substantial justification for the June 27th letter, which was sent to Orozco after she was terminated, is against the clear preponderance of the evidence. (*See* Tr. at 219:3-19; 224:6-20).

Not all conduct that can, in some general sense, be characterized as an exercise of a right enumerated in section 7 is afforded the protection of the Act. Texas Instruments Inc. v. N.L.R.B., 637 F.2d 822, 830 (1st Cir. 1981). Section 7 does not protect all concerted activities. City Disposal Sys., 465 U.S. at 837, 104 S.Ct. at 1514; Roadmaster Corp. v. N.L.R.B., 874 F.2d 448, 452 (7th Cir. 1989). "An employee may engage in concerted activity in such an abusive manner that he loses the protection of § 7." City Disposal Systems, 465 U.S. at 837, 104 S.Ct. at 1514. *See also* Roadmaster Corp., 874 F.2d at 452 (If an employee engages in indefensible or abusive conduct, his otherwise concerted activity will lose the protection of § 7). Conduct that is disruptive or that amounts to blatant insubordination typically will fall into the category of unprotected behavior. Formella v. U.S. Dept. of Labor, 628 F.3d 381, 391 (7th Cir. 2010).

Whether an employee's concerted activity remains under the protection of § 7 depends on the facts of each particular case. Roadmaster Corp., 874 F.2d at 452.

The ALJ relies on Banner Health Sys., 358 N.L.R.B. No. 93 (N.L.R.B. July 30, 2012). The facts of that case are distinguishable in that it involved an employer's rule prohibiting employees from discussing ongoing investigations of employee misconduct. Here, Orozco had already been discharged and UniQue was afraid of what its former employee might do.

Ms. McFadden testified that she was concerned about what Orozco would do once she was terminated. (Tr. at 224:11-13). Contrary to the ALJ's finding, UniQue's concerns were credible, reasonable and justified. The fear was based on the fact that (1) Orozco would talk about people who "had her back" and were there to protect her, and (2) the fact that Orozco had told Mr. Smith that she was going to cause a big scene at and disrupt the company party. (Tr. at 224:11-23). Ms. McFadden testified that she heard Orozco talk about some of the associates that would come in, and how they would have her back if something were to happen. (Tr. at 219:6-19). She stated that this "put several of us in fear of, … if something … were to happen what would take place?" (Tr. at 219:6-19). Ms. Castro testified that Orozco had previously told her "about people that she knew that would have her back and take care of things she needed taken care of." (Tr. at 164:3-15). For instance, she commented to Ms. Castro that one of the persons who came in to check for a job assignment was "one of the people that [had her] back," saying that if she had any issues they could take care of it for her, and then she wouldn't be in trouble for anything because they would take the blame for it, so to speak. (Tr. at 164:8-15). Ms. Castro testified that on that occasion she did have concerns about those comments, because at the time they were made she and Orozco "were having a little bit of a tiff between [themselves]." (Tr. at 164:24-165:8). As a result, Ms. Castro, who was Orozco's friend, testified that she was "a little

bit in fear of what [Orozco was] capable of doing." (Tr. at 165:11-12). On June 27th, but after Orozco was terminated, Ms. Castro told Ms. McFadden that Orozco told her that she was going to make a scene at the company picnic. (Tr. at 174:2-12). Ms. McFadden was also concerned regarding what Orozco would do and say to clients. (Tr. at 225:1-13).

5. Even if Orozco Was Engaged in Concerted Activity, Which UniQue Denies, UniQue Did Not Violate Section 7 of the National Labor Relations Act.

UniQue's decision to discharge Orozco on June 27, 2014 did not violate the NLRA, in that there is no evidence that UniQue knew of the purported concerted nature of Orozco's activity, the concerted nature of which UniQue expressly denies. Rather, Orozco would have been discharged even in the absence of the alleged protected activity for UniQue had legitimate non-discriminatory and non-retaliatory reasons to discharge Orozco. Among other things, Orozco's unprofessionalism was disruptive and harassing to other employees.

Nowhere was it indicated to UniQue, prior to Orozco's discharge, that Orozco and other employees were united in pursuit of a common goal regarding terms and conditions of their employment or that Orozco's actions complaining to a co-worker constituted an individual action to bring to the attention of UniQue true group complaints. There is no evidence that UniQue was aware of any protected activity. Prior to discharging her, UniQue's only knowledge was that Mr. Smith complained to a representative of the Human Resources Department that Orozco was engaging in what they deemed unprofessional conduct by talking incessantly to him, to the point where Mr. Smith could not do his job and that she threatened to disrupt and cause a scene at the company picnic.

Here, Orozco was properly discharged by UniQue due to her unprofessionalism as set forth at length above. Even if she participated in concerted action, which UniQue denies, she cannot disrupt and harass co-workers in doing so. Orozco's actions clearly were disruptive and

harassing. Her unprofessional conduct included talking and complaining to co-workers to the point that they could not get their work done. Both Mr. Smith and Ms. Castro testified that they found Orozco's constant talking to be disruptive and harassing because they could not do their jobs. (Tr. at 131:21-132:9; 146:15-147:4; 166:24-167:1). Mr. Smith complained about the disruptive and harassing behavior to Human Resources and Ms. Castro complained about the behavior to her superiors. While Ms. Castro testified that Orozco's behavior improved for a period of time; she further testified that it then **went back to the way it was**. (Tr. at 172:1-4).

Orozco's unprofessionalism and disruptive behavior was also evidenced by her threats to make a scene at the company picnic. Again, there is no evidence that she was preparing to bring truly group complaints to the attention of management or that she was representing anyone's interest but her own. Even if there was such evidence, she is not protected by the NLRA for the threats that she made. "An employee may engage in concerted activity in such an abusive manner that he loses the protection of § 7." City Disposal Systems, 465 U.S. at 837, 104 S.Ct. at 1514.

6. UniQue's Reason for Discharging Orozco Was Not Pretextual or False and Was Not a Result of Any Discriminatory Animus Towards Orozco.

The ALJ's finding (at page 19 of the Decision) that UniQue's stated reason for discharging Orozco was pretextual or false is against the clear preponderance of all of the relevant evidence. The June 27th termination letter was given to Orozco to explain to her that the reason for her termination was due to her unprofessionalism. Her unprofessionalism is set out in detail above and is incorporated herein by reference, but it includes her appearance and her incessant talking which distracted others from doing their jobs. The ALJ's finding that Ms. McFadden expressed displeasure with Orozco for talking with coworkers about their conversations on work related issues for "months, weeks, and minutes prior to Orozco's

discharge" is not supported by the evidence. (Decision at 19). On the first review Ms. McFadden commented: "It has been brought to my attention as well that whenever I address an issue it is talked about with other co-workers when it should be between Ana and I." That single comment is insufficient to support the ALJ's broad finding that Ms. McFadden had for "months, weeks and minutes prior to Orozco's discharge" expressed displeasure with Orozco for talking with coworkers about their conversation on work related issues. That comment, which was not repeated in the second positive review given on November 25, 2013, is certainly not a strong criticism, if a criticism at all. Further, as set forth above, neither Ms. McFadden nor Ms. Rehmke instructed Orozco that she could not talk to co-workers about employment issues during the exchange which took place immediately before Orozco was handed her termination letter.

The ALJ incorrectly found that the General Counsel had met its burden of proving that UniQue's actions demonstrated discriminatory animus towards Orozco. The evidence simply does not support such a conclusion. The ALJ's finding that UniQue "seized on a few trivial offenses committed by Orozco to effectuate its true purpose of discharging Orozco" is itself incredible in light of the evidence. Orozco's conduct was so unprofessional that others could not do their jobs. Tasks that should have taken 30-45 minutes took much longer because of Orozco's incessant talking. This was not a minor problem. It was a significant problem in the beginning of Orozco's employment with Unique, lessened for a period of time, but months before she was discharged had returned to the way it was at the beginning.

The ALJ's finding (at page 8, footnote 16 of the Decision) that the second dress code warning was not warranted and that Orozco was wearing capris pants, as opposed to cargo pants, at the firm sponsored golf outing is against the clear preponderance of all of the relevant evidence. (*See* G.C. Ex. 18). Exhibit 18 is a picture of the pants Orozco wore on the day of the

golf outing. They are clearly camouflage pants. (G.C. Ex. 18). The ALJ stated that based on her review of the photograph of the pants, she found them to be capris pants. It is not necessary, however, that they be either capris or cargo pants. They most certainly could be considered camouflage cargo capris pants. If you type in "camouflage cargo capris pants" on Google you will find pants just like what Orozco wore to the golf outing. Either way, the pants were not appropriate for this outing and did not constitute an outfit that would impress potential customers. (*See* G.C. Ex. 18). In fact, some Chamber of Commerce people at the golf outing commented on the pants, which obviously was not a good thing. Even Orozco's friend, Ana Castro, testified that the pants were not appropriate for this outing. (Tr. at 167:21-168:15). Contrary to the ALJ's finding, this second write-up, which was given to Orozco the day after the golf outing, was not pretextual.

IV. CONCLUSION

UniQue did not violate Sections 7 or 8 of the NLRA because Orozco, the charging party, was not involved in any "concerted activity" protected under the Act. Rather, the evidence demonstrates that Orozco's complaints represented personal gripes that were not representative of any other employee and were never intended to lead to any group action. Moreover, even if Orozco's complaints could somehow be construed as concerted activity, UniQue did not fire Orozco as a result of such protected activity. In fact, there is no evidence that UniQue knew of any of her purported concerted activities. Rather, Orozco was fired for legitimate reasons having nothing to do with any activities protected under the NLRA.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 23, 2015 this document was filed with the Court using the Agency's electronic website. A copy of the foregoing was sent by first-class prepaid mail to:

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